Supreme Court, U.S.
FILED
SEP 17 1992
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92-472

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRUCE E. HORNSBY,

Petitioner,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a railroad employee who seeks relief in the form of wages and benefits for his employer's alleged breach of Section 60 of the Federal Employers' Liability Act has a right to trial by jury under the Seventh Amendment.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 963 F.2d 1130, and is reprinted in the appendix hereto at 1a. The Memorandum Opinion of the District Court is reprinted in the appendix at 16a and the Order of the District Court striking the jury demand is reprinted in the appendix at 23a.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1992. A petition for rehearing was denied on June 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL STATUTE INVOLVED

United States Constitution, Amendment VII: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . .

45 U.S.C. § 60: Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both fine and imprisonment for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

Rule 38, Federal Rules of Civil Procedure: The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

STATEMENT OF THE CASE

This action was brought by petitioner Bruce E. Hornsby under Section 60 of the Federal Employers' Liability Act, 45 U.S.C. § 60, against his employer, respondent St. Louis Southwestern Railway Company for money damages and injunctive relief for discharging him after he testified for a fellow employee in connection with a suit against the railroad under the said Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* Section 60 prohibits railroad employers from disciplining their employees for furnishing information to fellow employees concerning their injuries and claims under the Federal Employers' Liability Act (F.E.L.A.).

St. Louis Southwestern discharged Hornsby after a jury verdict was returned for the injured employee, for the alleged reason that Hornsby's court testimony was false.

Hornsby filed suit under 45 U.S.C. § 60 and made a timely demand for a jury trial. The District Court struck the jury demand and at the conclusion of the trial entered judgment on January 2, 1991 for St. Louis Southwestern dismissing the suit with prejudice.

The U.S. Court of Appeals, Eighth Circuit, affirmed the judgment on May 12, 1992 with one judge dissenting and denied a petition for rehearing on June 24, 1992.

Petitioner Hornsby began his employment with the St. Louis Southwestern Railway Company as a brakeman in 1965; he was promoted to conductor in 1970 and had worked steadily for the railroad for twenty-two years until discharged.

On April 21, 1982, Clarence Broome, a fellow employee, injured his back as he threw or lined a switch. At the time of the incident Broome was part of a crew of six

that included the petitioner Hornsby, that had been ordered to move some seventy or ninety freight cars from Pine Bluff to Jonesboro, Arkansas. Hornsby was seated in the first seat on the left side of the cab of the lead engine of a three engine consist. The engineer, Ernest M. Johnson, sat in the engineer's seat on the right side of the cab.

The three engine consist was facing north when it began its first movement in a backward and southerly direction. As it moved southerly, brakeman Clarence Broome was standing on the front platform of the lead engine in which the engineer and Hornsby were seated. As the three engine consist backed over a cross track containing a switch, brakeman Broome got off on the west or left side of the lead engine and signalled Hornsby to direct the engineer to stop the train; the train stopped and Broome went to the switch located on the west side of the engine intending to pull it so as to permit the engines to change direction when they proceeded forward. At the time Broome got off the engine and signalled the train to stop, the engineer sitting on the right side of the engine could not see him and relied on Hornsby sitting on the left side with a clear view of the brakeman to relay signals as to the engine's movement.

Broome approached the switch which consisted of a three foot handle bar which was located between 5 to 18 feet in front of the lead engine and began lifting it at which time he injured his back. It was evening at the time but the area in which he was working was well illuminated by lights from the engine.

At the time Broome was lining the switch, Hornsby was sitting in the first seat of the engine which is located about 2½ feet back from the front door of the engine; this front door has a glass window which together with

the side windows provided Hornsby with a clear view of both the switch and Broome.

Hornsby was watching Broome pull the switch for the purpose of then directing the engineer to proceed. Hornsby observed Broome line the switch and then to appear to be in some difficulty to which Hornsby stated to the engineer that it appeared that Broome had hurt himself. Although the switch had been lined, Hornsby did not signal the engineer to proceed but instead opened the door to assist Broome back into or on the engine. Hornsby then directed the engineer to return immediately to the caller's office to obtain medical assistance for Broome.

The consist returned to the caller's office where Hornsby and other members of the crew helped remove Mr. Broome where he was then transported to a hospital where he eventually underwent surgery for a back injury.

Shortly after Broome had been attended to, Hornsby asked the caller's office if the crew should proceed to Jonesboro with a crew member short; someone authorized the departure with a short crew and Hornsby then picked up seventy to ninety freight cars and proceeded to Jonesboro. The railroad's assistant trainmaster, Howard Spears, testified that Hornsby called him to ask if the crew should fill out the customary accident form 2611 before departing and that in response to Mr. Spears' question if anyone had seen the incident, Hornsby's reply was no.

The following morning, Hornsby and the rest of the crew filled in form number 2611 just before a van picked them up to transport them to a motel where they were to sleep. In answer to the form's question "Did you see accident," Hornsby inserted "no." In answer to the form's question "State how accident occurred," Hornsby put down "Brakeman Broome said he injured his back while trying to line crossover switch at roundhouse."

On January 27, 1986, the investigator for Brakeman Broome's attorney took Hornsby's statement in which he described observing Broome pull the subject switch. A copy of this statement was given to the railroad's attorney John Gunn on August 21, 1986. On September 12, 1986, attorney Gunn obtained a sworn statement from Hornsby in which he again described his observing of Broome pulling the subject switch on April 21, 1982.

On April 22, 1987, Hornsby was called as a witness in an F.E.L.A. personal injury claim entitled *Clarence Broome v. St. Louis Southwestern Railway Company* and testified that he had observed Broome pull the switch on April 21, 1982 which resulted in Broome's back injuries.

On April 30, 1987 the jury in the Broome trial returned a verdict in favor of Broome and against the railroad in the amount of 1.2 million dollars.

On May 6, 1987 the railroad charged Hornsby with dishonesty and immorality for either falsifying form 2611 or providing false testimony on April 22, 1987.

On May 30, 1987 the railroad discharged Hornsby from its employment for providing false testimony in Clarence Broome's F.E.L.A. trial.

Hornsby filed suit under 45 U.S.C. § 60 for money damages and reinstatement and made a timely demand for a jury trial. He presented evidence of lost wages and medical benefits from the date of discharge to April 30, 1990 which were $148,123.47. His loss of future wages and benefits totaled $707,708.00. On June 19, 1990 the Court ruled that Hornsby's claim was entirely equitable and struck the jury demand.

At the close of the evidence, the Court issued a memorandum opinion denying the relief sought in the complaint and entered judgment on January 2, 1991 dismissing the complaint with prejudice.

The U.S. Court of Appeals, Eighth Circuit, affirmed the judgment on May 12, 1992 with one judge dissenting and denied a petition for rehearing on June 24, 1992.

REASON FOR GRANTING THE WRIT

The Court of Appeals has erroneously excluded Section 60 of the Federal Employers' Liability Act from this Court's vigilant protection of the railroad worker's Seventh Amendment right to a jury trial in damage claims arising under the act.

ARGUMENT

Congress enacted the Federal Employers' Liability Act (F.E.L.A.) in 1908 in response to calls for reforms of the appalling working conditions endured by the nation's 1.1 million railroad employees. In 1907, 11,839 railroad workers died on the job, one in every twenty-five. Sitzman, A Look at the FELA in the Eighth Circuit, 21 Creighton L.R. 1073 (1988). The Act provides for damage suits by employees for on the job injuries caused by the employer's negligence. 45 U.S.C. § 51 *et seq.*

In 1939 Congress amended the Act to eliminate the defense of assumption of risk and proscribe retaliatory acts against workers providing information in an F.E.L.A. suit. 45 U.S.C. §§ 54, 60. The Senate Report accompanying the Section 60 amendment stated:

> "The railroads maintain well-organized and highly efficient claim departments. When an employee is injured, the claim agent promptly endeavors to procure statements from all witnesses to the infliction of the injury, takes photographs, measurements, and obtains all available information considered necessary to protect the railroad company against a possible suit for damages.

> On the other hand, the claimant may be seriously handicapped in his attempt to procure the information necessary to the determination of the question of liability. For example, a substantial number of the railroads subject to the Employers' Liability Act have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claim agents.
>
> The purpose of the amendment under consideration is to prohibit the enforcement of such rules and permit those who have information concerning the facts and circumstances of a personal injury to give statements to the injured employee or his dependents, or to someone authorized to represent him or them.
>
> In relation to the investigation of facts upon which claims for injuries are based, humanity and justice demand that injured railroad men be accorded as much freedom of action as their employers enjoy."

Senate Report No. 661, 76th Congress, Amending the Employers' Liability Act, June 22, 1939.

The Railroad Administration's Accident/Incident Reports for the five year period from 1987 to 1991 show 107,334 railroad workers injured and 222 killed.

In 1943 this Court in *Bailey v. Central Vermont Railway*, 319 U.S. 350 (1943) held that the Seventh Amendment's right to a jury trial was a basic and fundamental feature of our system of federal jurisprudence and part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act. This Court has vigilantly protected this right to a jury in a long series of F.E.L.A. cases. *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952); *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957); *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963); *Lorillard v. Pons*, 434 U.S. 575 (1978).

In *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952), this Court reversed a lower court's finding that the railroad's defense of release was an equitable matter to be decided by the court and reinstated a jury verdict finding the release to have been procured by fraud. In support of its ruling the Court remarked that releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration.

In *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992), this Court held that "a disregard of the command of (a) statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to damages from the party in default is implied." The Court reversed the Appellate Court's ruling in a lawsuit brought by a student for damages under Title IX of the Educational Amendments of 1972 for sexual abuse by a teacher, that since the Act did not expressly provide for damages as a remedy, none were available to her. This Court described as a long standing general rule that all appropriate relief is available in an action brought to vindicate a federal right when Congress has not spelled out a remedy. "It is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate."

Section 60 of the F.E.L.A. is one of those Acts which does not spell out a remedy for its violation. However, several courts have provided such a remedy by recognizing private causes of action seeking injunctive relief. *Hendley v. Central of Georgia Railroad Co.*, 609 F.2d

1146 (1980); *Gonzalez v. So. Pacific Transportation Co.*, 755 F.2d 1179 (1985), 773 F.2d 637 (1985). In both cases the courts ordered reinstatement and back pay. There were no requests for a jury trial. In ordering the payment of damages, the *Hendley* court stated that so long as the unlawfully discharged worker was deprived of his pay, there would be a continuing violation of Section 60.

The subject majority opinion has restricted Section 60's remedy to injunctive relief which includes back pay with no right to a jury. It erroneously cites *Hendley* and *Gonzalez* as recognizing "only a very narrow kind of civil relief." Actually *Hendley* and *Gonzalez* granted in full the only relief sought, namely reinstatement and back pay. The opinion then cites dictum in *Lewy v. So. Pacific Transportation Co.*, 799 F.2d 1281 (1986) for the proposition that Section 60 permits the award of back pay but not additional damages. *Lewy* involved a railroad worker who was discharged for filing an FELA accident claim and asked for Section 60 damages. The court correctly ruled that Section 60 is not applicable to wrongful discharges for filing F.E.L.A. actions but only for furnishing information to others. As dictum, and without explanation, the court volunteered its thought that Section 60 would not support an award for money damages.

Chief Judge Arnold in his dissenting opinion in the case at bar believed that the Seventh Amendment entitled Hornsby to a jury trial. He cites *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992) as authority for Section 60 permitting compensatory damages, and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen v. Wood*, 369 U.S. 469 (1962) for the Seventh Amendment's right to a jury when equitable and legal matters are joined. He notes that a money judgment is traditionally legal relief and a 42 U.S.C. §§ 1981 or 1983

claim for back pay is also legal. He goes on to state that the only exception to the general rule that back pay is legal relief is Title VII of the Civil Rights Act of 1964 whose particular language could perhaps explain its different treatment. Judge Arnold's distinction is contained in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 110 S.Ct. 1339 (1990) in which a union member seeking backpay for a union's breach of its duty of fair representation was entitled under the Seventh Amendment to a jury trial. The Court distinguished Title VII actions by noting that Congress specifically characterized Title VII back pay as a form of equitable relief; that the relief sought by the union member was not restitutionary because the back pay sought was not money wrongfully held by the union, but wages and benefits he would have received from his employer had the union acted properly. This description fits perfectly Hornsby's claim for wages and benefits for the railroad's breach of Section 60 of the Federal Employers' Liability Act for which he should have received a jury trial. There appears to be no justification to exclude Section 60 from the rights generated by the Seventh Amendment and no justification to categorize a Section 60 claim for wages and benefits as wholly equitable.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari be granted to review the decision of the Eighth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1227

Bruce E. Hornsby,	*	
	*	
Appellant,	*	Appeal from
	*	the United States
v.	*	District Court
	*	for the
St. Louis Southwestern	*	Eastern District
Railway Company,	*	of Arkansas.
	*	
Appellee.	*	

Submitted: September 10, 1991
Filed: May 12, 1992

Before ARNOLD,* JOHN R. GIBSON, and BEAM, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Bruce Hornsby appeals the district court's[1] judgment denying his claim against St. Louis Southwestern Railway Company for back pay and reinstatement under 45 U.S.C. § 60 (1988). The district court held that Hornsby's action

* The HONORABLE RICHARD S. ARNOLD became Chief Judge of the United States Court of Appeals for the Eighth Circuit on January 7, 1992.

[1] The Honorable Elsijane T. Roy, Senior District Judge for the Eastern and Western Districts of Arkansas.

was for declaratory and equitable relief and should be tried to the court. The court determined that Hornsby was discharged for intentionally giving false testimony about a co-employee's FELA claim, and that his behavior was not protected under 45 U.S.C. § 60. On appeal, Hornsby argues that his claim was for legal relief and hence the district court erred in striking his jury demand. He argues that the court's findings of fact, particularly as to credibility, were clearly erroneous. Finally, he argues that the district court erred in denying his discovery requests for production of the railroad's litigation file from the co-employee's FELA litigation. We affirm.

On April 21, 1982, Hornsby was working on a crew in the railroad yards in Pine Bluff, Arkansas, when Clarence Broome, a brakeman, injured his back as he threw or "lined" a switch. When Ashley Spears, an assistant trainmaster, met Broome in an office nearby, Spears was told that the other crew members wanted to speak to him. Spears contacted the crew by radio and a person whom Spears identified as Hornsby asked him if the crew members needed to fill out a Form 2611, an accident report form, before their train pulled out. Hornsby told Spears that none of the crew had seen the accident. Hornsby and other crew members filled out a Form 2611 the next day concerning Broome's accident. They stated that they had not witnessed the accident. In response to the question, "Did you see the accident?", Hornsby wrote "no," and stated: "Brakeman Broome said he injured his back while trying to line crossover switch at roundhouse." Hornsby claimed that he submitted another form, Form 2957, on April 23, 1982, in which he stated that he saw the accident, but this form was not discovered or produced, and there was no evidence on this issue other than Hornsby's claim of having submitted this form.

On January 27, 1986, Hornsby gave a statement about the accident to Rick Rosen, Broome's lawyer, in his FELA action against the railroad. The statement was provided to the railroad's defense attorney in August 1986, who in turn took another statement from Hornsby. In both statements, Hornsby claimed that he was an eyewitness to the Broome accident. On April 22, 1987, Hornsby appeared at Broome's trial and testified that he saw the accident occur. The jury awarded Broome $1,200,000.

At Broome's trial, Spears first learned that Hornsby claimed to have witnessed the Broome accident. Spears informed the railroad's division superintendent of the contradiction between Hornsby's statements at the time of the accident and his testimony at Broome's trial. The railroad conducted an investigation, and after a report from the hearing officer, the railroad superintendent concluded that Hornsby should be terminated because he had not explained the discrepancy between his 1982 and 1986-87 accounts of the Broome accident. The railroad fired Hornsby for dishonesty. His union, the United Transportation Union, appealed the dismissal under the provisions of the Railway Labor Act. A Special Board of Adjustments found that there was substantial evidence to support the conclusion that Hornsby had been dishonest and had thus violated company rules and that the railroad was justified in firing him. Hornsby did not appeal from the board decision.

Hornsby thereafter brought this action claiming that the railroad violated 45 U.S.C. § 60[2] in firing him. He sought

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[2] The relevant part of 45 U.S.C. § 60 provides:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees

(Footnote continued on following page)

reinstatement, payment of lost wages and benefits with interest, a declaration that the railroad's actions violated section 60, and an injunction prohibiting the railroad from taking disciplinary action in connection with the Broome suit.

The district court characterized Hornsby's action as one for declaratory and equitable relief and denied Hornsby's request for a jury trial. Order of June 19, 1990, slip op. at 1. After a bench trial, the district court entered judgment for the railroad. The district court observed that section 60 gives jurisdiction to order reinstatement and award back pay as a result of an employer's wrongful retaliation against FELA witnesses. Order of Jan. 3, 1991, slip op. at 6. However, section 60 does not protect a witness who deliberately gives false information. *Id.* (citing *Gonzalez v. Southern Pac. Transp. Co.*, 773 F.2d 637, 642 (5th Cir. 1985)). The court found that the discrepancies in Hornsby's statements about the Broome accident were not the result of innocent mistakes, but of intentional deception. *Id.* at 6-7. Insofar as there was a conflict between

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[2] *continued*

of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

Hornsby's testimony and Spears', the court found Spears to be the more credible witness. *Id.* at 7. Consequently, the court held that the railroad's discharge of Hornsby did not violate section 60. *Id.*

First, Hornsby argues that the district court erred in striking his request for a jury trial. The district court reasoned that the relief plaintiff sought pursuant to 45 U.S.C. § 60 was entirely equitable in nature and, thus, plaintiff had no entitlement to trial by jury on the issues presented. Order of June 19, 1990, slip op. at 1. Hornsby argues that his complaint sought a "money judgment" and therefore his claim should be considered "legal," and triable by a jury.

The only basis for relief Hornsby asserts is 45 U.S.C. § 60, a criminal statute designed to protect FELA witnesses from retaliation by their employers. Other circuit courts in construing this statute have recognized only a very narrow kind of civil relief. Courts have given equitable relief, including back pay, to prevent violation of section 60. *See Hendley v. Central of Georgia R.R.*, 609 F.2d 1146, 1152-53 & n.5 (5th Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981). "[A] district court's ability to enjoin a hearing or conduct which violates § 60 is essential to effectuate the purpose of the section." *Id.* at 1152. However, section 60 does not create a private cause of action for compensatory damages. *Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1291, 1293 (9th Cir. 1986). After recognizing the *Hendley* and *Gonzalez* holdings that section 60 provides statutory authority for injunctive relief, *Lewy* states: "[A]t most, [section 60] appears to authorize courts to exercise equitable jurisdiction over retaliation claims, and thus to award back pay, but not additional money damages." 799 F.2d at 1293 (citations omitted). We do not believe that those courts that have granted relief under

section 60 considered themselves to be recognizing new legal rights, but merely to be preserving the efficacy of a criminal prohibition. *See Gonzalez*, 773 F.2d at 644-45. Such prohibition in the civil context is effectuated by injunctive or equitable relief and this has been the extent of the remedy that has been recognized.[3] Therefore, the district court correctly struck Hornsby's request for a jury trial.

Second, Hornsby attacks the district court's findings on credibility. The district court, relying on *Gonzalez*, held that section 60 was not designed to protect FELA wit-

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[3] Judge Arnold in his uniquely persuasive manner argues that any claim seeking monetary relief must be a suit at common law for money damages. However, the distinction between legal and equitable issues persists even after *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), and does not ride on as simple a question as whether money will change hands if the plaintiff wins. The Supreme Court recently made this point at length:

> Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for the reinstatement of an employee with backpay, or for "the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949) (emphasis added). The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as "money damages." Thus, we have recognized that relief that orders a town to reimburse parents for educational costs that Congress intended the town to pay is not "damages" . . . .

Bowen v. Massachusetts, 487 U.S. 879, 893-94 (1988). *Bowen* was interpreted by the District of Columbia Circuit as holding that backpay is equitable relief. *See Hubbard v. E.P.A.*, 949 F.2d 453, 462-66 (D.C. Cir. 1991). The decision was vacated for rehearing en banc.– 1992 U.S. App. LEXIS 3840 (March 2, 1992). *But see Santiago-Negron v. Castro-Davila*, 865 F.2d 431, 440 n.9 (1st Cir. 1989).

nesses who deliberately give false information, and that if a witness lied in an accident report, section 60 presented no barrier to firing him. Order of Jan. 3, 1991, slip op. at 7. The district court concluded that Hornsby had been dishonest rather than mistaken, and that Spears was more credible than Hornsby. Accordingly, the court decided section 60 did not prevent Hornsby's discharge.

Hornsby argues that these findings of the district court are clearly erroneous. In this respect, our analysis is governed by *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). We may only reverse if we are left with a definite and firm conviction that a mistake has been committed. *Id.* If the district court's account of the evidence is plausible in light of the record in its entirety, we may not reverse. Where findings are based on determinations of credibility, this court must pay even greater deference to the district court's findings. *Id.* at 575. Hornsby argues that there is overwhelming evidence that he was in a position where he would have seen the accident, but the essence of his argument is simply to ask this Court to override the district court's view on his and Spears' credibility. This we will not do. The district court's conclusion that Hornsby lied is certainly a permissible view of the evidence, and that being so, we may not reverse. *See id.* at 574.

Finally, Hornsby contends that the district court erred in refusing to compel the railroad to produce certain documents from the file of John Gunn, the railroad's attorney in the Clarence Broome case. Hornsby sought to discover "the entire litigation and claims files maintained by either the St. Louis Southwestern Railway Company and/or their [sic] legal counsel, John Gunn." The railroad produced the requested documents except those which it claimed were shielded by attorney-client or work product privilege. The

railroad filed a list of the documents it claimed were privileged, and offered to make Mr. Gunn available for deposition. The district court reviewed the listed documents *in camera* and ordered one of them to be produced, even though the document was apparently subject to the attorney-client privilege. Order of April 26, 1990, slip op. at 1. The court did not order the railroad to produce its other privileged documents. *See id.* at 1-2.

Hornsby now contends that the district court should have required production of all the documents. The list of withheld documents indicates that they are either an attorney's notes made in preparing a case, or in a few instances, attorney-client communications. Hornsby points to no act by the railroad that would amount to a waiver of any privilege; therefore, his reliance on *Greater Newburyport Clamshell Alliance v. Public Service Co.*, 838 F.2d 13 (1st Cir. 1988); *Hollins v. Powell*, 773 F.2d 191 (8th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986); and *In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1314-15 & n.20 (7th Cir. 1984), is misplaced. Nor does Hornsby give us any reason to believe that the documents were prepared in the context of Gunn's providing services *other* than legal work; therefore, Hornsby's citation to *United States v. Horvath*, 731 F.2d 557 (8th Cir. 1984), is also inapposite. Hornsby has received all (if not more than) the discovery he was entitled to from Gunn's files.

We affirm the judgment of the district court.

ARNOLD, Chief Judge, dissenting.

Because I believe that the Seventh Amendment entitled Hornsby to a jury trial, I respectfully dissent.

The Seventh Amendment states that "[i]n suits at common law . . . the right of trial by jury, shall be preserved . . . ." In general, if any claim in a case is legal, the Seventh Amendment guarantees the right to a trial by jury. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). The Court holds that both of Hornsby's claims—reinstatement and back pay—were equitable, and that the District Court therefore properly denied his request for a jury trial. I agree that reinstatement is an equitable remedy, but I do not agree that backpay, at least in this case, is also an equitable remedy. And if back pay is a legal remedy, as I believe it is, this Court is denying Hornsby his constitutional right to a jury trial.

Suppose Hornsby had brought an action claiming that he had been fired in breach of his employment contract and asking only for back pay, that is, for the pay that he would have received absent the breach up until the time of judgment. Or suppose he had claimed a wrongful discharge under state tort law and, again, asked only for his back pay. In this event, I take it, everyone would agree that a jury trial is required. A money judgment is traditionally legal relief, and this holds true both in commonlaw tort or contract actions, and, apparently, in actions under any federal statute with the exception of Title VII of the Civil Rights Act of 1964. See, *e.g.*, *Lorillard v. Pons*, 434 U.S. 575 (1978) (jury trial available on request of any party in actions for back pay under the Age Discrimination in Employment Act).

In the present case the claim for back pay is joined with an equitable claim for reinstatement. Why should this make a difference? It is commonly said that the back-pay

request is "incidental" to the equitable claim for reinstatement, and is therefore itself equitable. Thus, the theory appears to be that a clearly legal claim for money becomes equitable, and the constitutional right to a jury is lost, simply because the plaintiff also seeks a form of equitable relief. This appears to be nothing more than an application of the traditional clean-up doctrine, under which a court of equity, once it obtains jurisdiction, can give complete relief, including relief that, if sought alone, would be considered legal. This doctrine, basically a rule of judicial economy, grew up in the days, now long gone in the federal courts, of separate courts of equity and law. In that context, it made sense. Otherwise, someone seeking both legal and equitable relief would have to bring two cases in two different courts. The Supreme Court has clearly held, however, that the clean-up doctrine is not to be transplanted into modern, merged federal practice in such a way as to infringe on the Seventh Amendment. Thus, when legal and equitable claims are joined, the legal claim, including all issues of fact common to both claims, must be submitted to a jury. *Beacon Theatres, Inc., supra*; *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). The opposite view, that the jury nature of a claim, so to speak, disappears when it is joined with an equitable claim, was vigorously advocated by the dissent in *Beacon Theatres*, 359 U.S. at 517-18 (Stewart, J., dissenting), and just as vigorously rejected by the Supreme Court.

Why should not this analysis, which appears well settled, be followed here? Our own cases seem inconsistent on the proper characterization of back pay. It is said that a Title VII claim for back pay is equitable, while a 42 U.S.C. § 1981 or § 1983 claim for back pay is legal. See *Setser v. Novack Inv. Co.*, 657 F.2d 962 (1981) (en banc); *Sisco v. Alberici Constr. Co.*, 655 F.2d 146, 151 (8th Cir. 1981),

cert. denied, 455 U.S. 976 (1982). Title VII, however, appears to be the only exception to the general rule that back pay is legal relief. Although I cannot see how to justify this anomaly, the difference in treatment may have resulted from the particular language Congress chose in allowing back pay in Title VII cases. See 42 U.S.C. § 2000e-5(g). Back pay is included in what the statute calls equitable remedies and is to be awarded "as the court deems appropriate." *Id.* It is this complete discretion given to the courts in determining the availability and amount of back pay that the courts have emphasized in holding that back pay under Title VII is equitable rather than legal relief.

How should we resolve this split of authority in doubtful cases? On the one hand, we risk giving the plaintiff a jury trial when the Seventh Amendment might not actually require one. On the other hand, we risk denying the plaintiff a jury trial when the Seventh Amendment does require one. As between these two choices, it is better to err in favor of giving the plaintiff a jury trial when the Seventh Amendment might not require it. There is no constitutional right to a nonjury trial. Consequently, if an equitable claim is tried to a jury, the error may well be harmless; and even if it is not, the case may simply be remanded to the judge who presided over the jury trial to enter findings of fact. If, however, a legal claim is not tried to a jury upon proper request, the mistake is of constitutional import, and the case must be remanded for an entirely new trial. Therefore, if not because of the constitutional importance of a potential mistake, at least for the sake of judicial economy, we should resolve close cases in favor of a jury.

The Court suggests two reasons for denying Hornsby a jury trial. First, it says that the underlying statute, 45

U.S.C. § 60, is a criminal statute. I fail to see how this fact cuts against a trial by jury. If anything, it should cut in favor of a jury trial. Clearly—although under the Sixth rather than the Seventh Amendment—a criminal prosecution of the Railway Company under Section 60 would entitle the Railway to a jury trial. Why, then, is a plaintiff who sues civilly for monetary damages for violation of Section 60 not entitled to a jury trial? Although the Supreme Court has not directly spoken on this particular Seventh Amendment issue with regard to a criminal statute, *Tull v. United States*, 481 U.S. 412 (1987), is analogous. In *Tull* the Court held that the Seventh Amendment guarantees a jury trial on the issue of liability in an action seeking civil penalties and injunctive relief under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* Although Section 60 is a criminal-penalty statute, a civil suit by Hornsby for reinstatement and back pay is factually quite close to *Tull*.

Second, the Court suggests that while Section 60 creates a private cause of action for "equitable relief, including backpay," *ante* at 5, it does not create a private cause of action for compensatory damages. This is offered as another reason to deny a litigant suing for relief under Section 60 a jury trial. I respectfully disagree. First, I have already expressed my view that back pay in the present context is legal, not equitable, relief, and hence, for that reason alone, the Seventh Amendment guarantees a litigant the right to a jury trial. Moreover, I disagree that Section 60 would not have allowed a private cause of action for compensatory damages and, consequently, a jury trial, if Hornsby had included such a claim in his complaint. The Supreme Court has recently held as much. In *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028, 1032 (1922) (citing *Davis v. Passman*, 442 U.S. 228,

246-47 (1979)), the Court held that once it has been determined that a private right of action exists, we are to "presume the availability of all appropriate remedies [specifically including damages] unless Congress has expressly indicated otherwise." In the case before us, by entertaining the issue it does, the Court admits that a private right of action to enforce Section 60 exists. Thus, according to *Franklin*, we have the power to award any and all appropriate relief including, if Hornsby had so requested, compensatory damages. If he had done so, surely the Court would not have denied him the right to a jury trial.

I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1227EALR

Bruce E. Hornsby,	*	
	*	
Appellant,	*	Appeal from
	*	the United States
vs.	*	District Court
	*	for the
St. Louis Southwestern	*	Eastern District
Railway Company,	*	of Arkansas.
	*	
Appellee.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 8, 1992

Order Entered in Accordance with Opinion:

/s/ MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1227EALR

Bruce E. Hornsby,	*	
	*	
Appellant,	*	
	*	Order Denying Petition
vs.	*	for Rehearing
	*	and Suggestion for
St. Louis Southwestern	*	Rehearing En Banc
Railway Company,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. Chief Judge Arnold, Judge McMillian and Judge Morris S. Arnold would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

June 24, 1992

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit

[Dated January 2, 1991]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

BRUCE E. HORNSBY

PLAINTIFF

V. NO. LR-C-89-364

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY

DEFENDANT

MEMORANDUM OPINION

This is an action for declaratory and equitable relief pursuant to the Federal Employers' Liability Act (the "Act"), 45 U.S.C. §§ 51-60. Specifically, plaintiff asks the Court to declare that his termination by defendant violated 45 U.S.C. § 60, to direct defendant to compensate him for all back pay he has lost, and to reinstate him to his former position. This cause was tried to the Court on July 9, 10 and 13, 1990. The parties have received copies of the trial transcript and filed their post-trial briefs and proposed findings of fact and conclusions of law. Thus, this matter is ripe for adjudication.

Plaintiff was employed by defendant from 1968 until his discharge on May 30, 1987. Plaintiff worked as a brakeman for the first five years of his employment and as a conductor for the last 17 years. On April 21, 1982, plaintiff was directed to report to defendant's yard in Pine Bluff, Arkansas to serve as part of a six-man crew assigned to move a train of freight cars to Jonesboro, Arkansas. While the consist of three engines was being moved with-

in the yard for coupling with the freight cars, one of the brakemen, Clarence Broome, suffered an injury to his back as he threw, or lined, a switch. After Broome returned to the lead engine, the consist was moved back to the caller's office and Broome was assisted into that office by other crew members. Ashley Spears, Assistant Train Master, met Broome in the caller's office to check on his condition.

While in the office with Broome, Spears was advised that the other crew members wanted to talk to him. Spears contacted the crew with his portable radio and spoke with plaintiff. Spears testified that plaintiff asked if the crew members needed to fill out a Form 2611, defendant's required report used for accident investigations, before their train pulled out. He also testified that plaintiff stated that none of the crew had seen the accident. Spears further testified that he advised plaintiff that it was not necessary for them to complete the forms at that time and that it would be sufficient if they did so before they returned to Pine Bluff. Spears was "positive" that it was plaintiff he talked to on the radio that evening. After talking with plaintiff, Spears took Broome to the hospital for medical attention.

Each of the five remaining crew members filled out a Form 2611 the next day concerning Broome's accident. Consistent with what plaintiff told Spears the night of the occurrence, the forms revealed that none of the other crew members witnessed the accident. On his form, in response to the question, "Did you see the accident?," plaintiff simply wrote "no." In response to the request that the employee state how the accident occurred, plaintiff stated that "Brakeman Broome said he injured his back while trying to line crossover switch at roundhouse." Steve Sindick, a claims agent for defendant who was as-

signed to Pine Bluff at the time of the accident, testified that he did not undertake to interview any of the other crew members after learning from the 2611 reports that none of them had seen the accident.

Plaintiff testified that he also submitted another of defendant's forms, a Form 2957, concerning this accident, which he testified he filled out on April 23, 1982. Plaintiff claims that in the 2957 he stated he saw the accident. The only Form 2957 produced at trial, and introduced into evidence, was one prepared by C. R. Rickels, Chief Clerk to the Terminal Superintendent. Although plaintiff suggests that Rickels used information obtained from plaintiff's 2957 in completing the form introduced into evidence, Rickels testified that none of the information he relied upon in filling out the form was obtained from plaintiff. Neither the original nor a copy of the 2957 allegedly submitted by plaintiff was discovered or produced, and no other evidence substantiating plaintiff's claim of having submitted one was presented.

Nearly four years later, on January 27, 1986, plaintiff gave a statement concerning the accident in question to Rick Rosen, the lawyer retained by Broome to represent him in a personal injury lawsuit against defendant in the State of Illinois. This statement was provided to John Gunn, defendant's attorney in that case, in August of 1986. On September 12, 1986, Gunn took a statement from plaintiff in the Claims Department in Pine Bluff. In both statements, plaintiff claimed that he was an eyewitness to Broome's accident. Subsequently, on April 22, 1987, plaintiff appeared at the Broome trial in Illinois and testified on Broome's behalf. After several days of trial, the jury returned a verdict in the amount of $1,200,000.00 in favor of Broome and against defendant.

Carl Bradley, the terminal superintendent at Pine Bluff at the time of the Broome accident, and Ashley Spears were also called as witnesses at Broome's trial. Both Bradley and Spears testified at the trial of the instant case that it was at Broome's trial that they first learned that plaintiff claimed to have witnessed Broome's accident. In corroboration of that testimony, Gunn testified that he did not provide a copy of either of plaintiff's 1986 statements to anyone in defendant's operating department.

When Spears returned to Pine Bluff after the completion of Broome's trial, he advised Robert McClanahan, defendant's Division Superintendent, of what transpired in the trial. Soon thereafter, the decision was made to investigate the cause of, or reason for, the discrepancies between what plaintiff said in 1982 and his testimony at the trial in 1987. On May 6, 1987, plaintiff was officially notified that an investigation was being commenced into what appeared to be a possible violation of company rules concerning dishonesty and immorality. McClanahan appointed W. M. Taylor to serve as the hearing officer on the charges against plaintiff.

After a hearing that lasted eight days, Taylor recommended to McClanahan that plaintiff be terminated from employment with defendant. McClanahan decided, after conducting a rather thorough review of the hearing proceedings, that plaintiff had not satisfactorily explained the considerable discrepancies between his 1982 and 1986-87 accounts of the incident. McClanahan decided that termination was appropriate and plaintiff was informed by a letter from Taylor dated May 30, 1987 that he was being discharged for dishonesty and immorality in violation of Rule L (4) and (5) of the General Code of Operating Rules and Rule 607 in Time Table Special Instructions No. 5.

Acting through his union, the United Transportation Union ("UTU"), plaintiff appealed his dismissal pursuant to the provisions of the Railway Labor Act. After his attempts to have the dismissal set aside proved unsuccessful at all lower levels of the appeals process, plaintiff ultimately appealed to Special Board of Adjustment 100 ("Board"). On March 1, 1989, the Board rendered its decision, Award 484, on plaintiff's case. The board found that there was substantial evidence to support the conclusion that plaintiff had been dishonest and had violated company rules in so doing. The Board further found that defendant was justified in terminating plaintiff on account of his lack of candor and truthfulness with respect to the Broome accident. Plaintiff did not avail himself of his right to appeal the Board's decision under the Railway Labor Act. Instead, on May 16, 1989, plaintiff filed the instant action seeking the relief set out hereinabove.

The Court is of the opinion that the only issue to be decided in this matter is whether defendant violated 45 U.S.C. § 60 in terminating plaintiff.[1] Section 60 provides, in essence, that anyone who attempts to prevent a railroad employee from voluntarily furnishing information about work-related accidents to an interested party, or discharges or disciplines an employee for furnishing such information, is subject to criminal penalties. In the civil

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[1] Although plaintiff asserts that the investigation was commenced well after the expiration of 20 days from the time defendant learned of the differing statements, allegedly in violation of the collective bargaining agreement between UTU and defendant, the Board found that defendant did not "learn" of the divergence between the statements until the Broome trial in April of 1987. Thus, the Board concluded that the 20-day limitation was not violated. Inasmuch as plaintiff chose not to appeal the Board's determination, the Court finds that this issue is not before it in this litigation.

context, it has been found that § 60 gives a federal district court jurisdiction to both order the reinstatement of an employee discharged in violation of that section and to award back pay for all income lost as a result of the employer's wrongful conduct. *See Hendley v. Central Georgia Railroad Company*, 609 F.2d 1146 (5th Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981).

However, it has also been specifically found that "the Act was not designed to protect FELA witnesses if they deliberately give information known by them to be false." *Gonzalez v. Southern Pacific Transportation Company*, 773 F.2d 637, 642 (5th Cir. 1985). After careful review of the testimony and exhibits presented at trial, and consideration of all applicable law, the Court finds that the discrepancies between plaintiff's various statements about the Broome accident were not the product of innocent mistake, but, rather, were the result of intentional deception on plaintiff's part. Where plaintiff's testimony was in conflict with that of Ashley Spears, the Court finds Spears to have been the more credible witness. In accordance with *Gonzalez*, the Court finds that 45 U.S.C. § 60 presents no barrier to plaintiff's discharge for violation of company rules concerning dishonesty and immorality. Having found that plaintiff was guilty of dishonesty in violation of defendant's rules, the Court further finds that plaintiff is entitled to no protection under the statute. Judgment in accordance with this Opinion shall be filed contemporaneously herewith.

DATED this 2nd day of January, 1991.

/s/ ELSIJANE T. ROY
UNITED STATES DISTRICT JUDGE

[Dated January 2, 1991]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

BRUCE E. HORNSBY

PLAINTIFF

V. NO. LR-C-89-364

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY

DEFENDANT

JUDGMENT

Pursuant to the Opinion entered in this matter on this date, it is Considered, Ordered and Adjudged that plaintiff's complaint should be, and it is hereby, dismissed with prejudice. The relief sought therein is denied. Each party shall bear its own costs herein.

DATED this 2nd day of January, 1991.

/s/ ELSIJANE T. ROY
UNITED STATES DISTRICT JUDGE

[Dated June 19, 1990]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

BRUCE E. HORNSBY

PLAINTIFF

V. NO. LR-C-89-364

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY

DEFENDANT

ORDER

Before the Court is defendant's Motion to Strike Jury Trial Request, to which plaintiff has responded. In the motion, defendant argues that the relief sought by plaintiff pursuant to 45 U.S.C. §60 is entirely equitable in nature and, thus, plaintiff has no entitlement to trial by jury on the issues presented. In response, plaintiff contends that trial by jury is a key part of the remedy afforded under the Federal Employers' Liability Act and that he is entitled to such a trial in this matter.

While an injured plaintiff is ordinarily entitled to a trial by jury in an FELA case, this is not an ordinary FELA action. Plaintiff has not cited the Court any persuasive authority for the proposition that he is entitled to a trial by jury. Nor has the Court discovered any on its own. Accordingly, inasmuch as equitable matters are typically for the Court's consideration, the Court finds that defendant's motion should be, and it is hereby, granted. This cause shall proceed on the Court's non-jury docket.

DATED this 19th day of June, 1990.

/s/ ELSIJANE T. ROY
UNITED STATES DISTRICT JUDGE